

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ERNEST MICHAEL RUEDA,

Defendant-Appellant.

UNPUBLISHED

March 24, 2011

No. 291914

Saginaw Circuit Court

LC No. 07-029053-FC

ON RECONSIDERATION

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Ernest Michael Rueda appeals by delayed leave granted the scoring of offense variables (“OVs”) 1, 2, 12 and 13. Rueda pleaded guilty to one count of armed robbery, MCL 750.529, and the trial court dismissed three additional armed robbery counts. The trial court sentenced Rueda as a second habitual offender, MCL 769.11, to 9 to 40 years’ imprisonment. We affirm in part, reverse in part and remand for resentencing.

Rueda’s plea-based conviction stemmed from two armed robberies involving four victims. Within a several-hour period on December 20, 2006, Rueda and three confederates, Courtney Burton, Javonte Howell and Leverene Bracey, robbed the victims at separate Saginaw County locations. The charge forming the basis for this appeal arose from an armed robbery committed outside the Warwick Cleaners in Saginaw. At that location, Rueda and his cohorts approached a couple sitting in a parked vehicle. Howell pointed a gun at the vehicle’s occupants, and the robbers took items from both victims, including the man’s wallet, the woman’s cell phone, and an MP3 player. Shortly after this robbery, Rueda, Burton, Howell and Bracey, approached and robbed two additional male victims. One of the robbers displayed a handgun during this encounter. Rueda acknowledged that he and his cohorts intended to commit the robberies to obtain money for Christmas gifts.

On January 24, 2008, Rueda pleaded guilty to one count of armed robbery involving one of the Warwick Cleaners’ victims. Rueda agreed to acknowledge his habitual offender status and testify against his co-defendants in exchange for the dismissal of the remaining three armed robbery counts. At Rueda’s sentencing on August 25, 2008, the trial court scored 15 points on OV 1, 5 points on OV 2, and 25 points each for OV 12 and OV 13. Based on the scoring of

these variables, Rueda's minimum guidelines sentencing range was 108 to 225 months. His sentence of 9 to 40 years' imprisonment places him at the bottom of this guidelines range.

Rueda preserved his challenges to the scoring of OV 1 and 2, but failed to properly preserve his challenges to OV 12 and 13 because he did not contest these scores at sentencing, in a motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). We review the interpretation and application of the statutory sentencing guidelines de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). "A sentencing court has discretion in determining the number of points to be scored [when calculating the sentencing guidelines], provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court reviews preserved scoring issues to determine if the sentencing "court properly exercised its discretion and whether the evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Unpreserved scoring errors are reviewable on appeal if the error has resulted in a sentence that is outside the appropriate guidelines sentence range. *Kimble*, 470 Mich at 310-311. We review unpreserved sentencing issues for plain error that affected a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Rueda raises three challenges to the scoring of OV 1. Offense variable 1 pertains to "the aggravated use of a weapon," and is scored "by assigning the number of points attributable to the [subcategory] that has the highest number of points." MCL 777.31(1). This offense variable permits the trial court to score 15 points if "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31(1)(c).

Rueda first contends that because he did not personally wield the handgun used in the robberies, the trial court improperly scored points under OV 1. However, the plain language of MCL 777.31(1)(c) permits a trial court to score 15 points "if a firearm was pointed at or toward a victim," and does not require that the defendant wield the weapon. As there is no dispute that Rueda's accomplice, Howell, possessed and pointed a weapon at or toward the victims of these robberies, the trial court did not err in scoring OV 1 accordingly. Our conclusion is also consistent with MCL 767.39, which provides that an individual convicted as an aider and abettor "shall be punished as if he had directly committed such offense." Therefore, it was unnecessary to demonstrate that Rueda personally possessed or used the weapon to threaten the victims.

Rueda next asserts that because the gun used in the robbery was inoperable and analogous to a "toy," no evidence supports the OV 1 scoring. Record evidence establishes that Howell displayed what was later determined to be an inoperable handgun during the subject robbery. While the arresting officers readily acknowledged that the handgun lacked various internal parts, no evidence exists that it was not a "real" handgun. One of the arresting officers testified at the preliminary examination that the weapon retrieved "was an actual gun that just wasn't complete, because there were parts missing." The same police officer identified the "make" of the weapon as "Rigarmi" and described it as a ".25 caliber."

The Legislature set forth in MCL 8.3t the following definition of a firearm:

The word “firearm”, except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB’s not exceeding .177 calibre by means of spring, gas or air.

In accordance with MCL 8.3t, the handgun’s inoperability does not preclude it from meeting the statutory definition of a firearm. Interpreting statutory language substantively identical to that contained within MCL 8.3t, our Supreme Court determined that “a weapon be considered a firearm if it was designed or intended to propel a dangerous projectile by means of an explosive, gas, or air.” *People v Peals*, 476 Mich 636; 720 NW2d 196 (2006).¹ In *Peals*, the Supreme Court specifically rejected an operability requirement for defining a weapon as a “firearm.” *Id.* at 655-656. The Court further distinguished between inoperable weapons and those that “are so substantially redesigned or altered” that they could not meet the statutory definition of a firearm. *Id.* at 652 n 7. Specifically, the Court indicated that a weapon that “has been [irreversibly] converted into an ornamental display” could no longer be construed as a firearm. *Id.* Here, the mere fact that the weapon used in this robbery had been rendered temporarily inoperable does not remove it from falling within the definition of a firearm. Accordingly, we reject this challenge to the scoring of OV 1.

Rueda lastly asserts regarding OV 1 that because none of his co-defendants had been sentenced and assigned points for possessing a weapon, MCL 777.31(2)(b) precluded the trial court from assigning him any points under this offense variable. Rueda premises his argument on MCL 777.31(2)(b), which provides that “[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.” Rueda’s reasoning would prohibit a trial court from ever scoring OV 1 in a multiple offender setting, because one offender must always be sentenced before the others. Accordingly, we find it immaterial that Rueda’s co-defendants had not yet been sentenced and attributed 15 points for OV 1 at the time of Rueda’s sentencing.

Next, Rueda asserts that the trial court improperly scored OV 2 at 5 points because the weapon used by Howell was inoperable.² MCL 777.32(1) pertains to the “lethal potential of the weapon possessed or used” and requires the assignment of the highest number of points possible. Five points are to be assigned, in accordance with MCL 777.32(1)(d), if “[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon.” The weapons delineated in MCL 777.32(1)(d) are defined within MCL 777.32(3)(c) as encompassing “a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm

¹ *Peals* addressed the language of MCL 750.222(d) regarding felon in possession of a firearm and possession of a firearm during the commission of a felony (felony-firearm).

² To the extent that Rueda contends that OV 2 is improperly scored based on the multiple offender provision of MCL 777.32(2), we reject this contention for the same reasons discussed with regard to OV 1, as Rueda does not deny that his cohort was in possession of and used a firearm to effectuate the robberies.

manufactured in or after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle.” Based on the same reasoning as set forth above regarding OV 1, we reject Rueda’s challenge to the scoring of OV 2. The Supreme Court explained in *Peals* that the statutory definition of a firearm simply does not require operability:

Th[e] language serves to *distinguish* firearms, which are a particular type of weapon, from weapons generally. A firearm is designed and used to expel dangerous projectiles It is the design and construction of a firearm, rather than its current state of operability, that distinguish it from other weapons In short, the statutory definition of “firearm” is *descriptive*. It describes the type of weapon that constitutes a “firearm,” so as to distinguish it from other types of weapons. It does *not* require the current operability of the weapon. [*Peals*, 476 Mich at 650 (citation omitted, emphasis in original).]

Furthermore, MCL 777.32(1) requires the assignment of points based on the “lethal potential” of the weapon used, not the “actual” potential. Such an interpretation is consistent with our Supreme Court’s discussion of similar statutes and determination that “[a]n extratextual operability requirement would . . . undermine the legislative intent to deter the possession of firearms by convicted felons and by persons committing felonies. That a gun is inoperable does not alleviate the extreme danger posed by its possession” *Peals*, 476 Mich at 653. Therefore, we uphold the trial court’s assignment of 5 points on OV 2.

Next, Rueda challenges the scoring of 25 points on OV 12, asserting the absence of record evidence to establish he committed three other robberies. MCL 777.42(1) addresses “contemporaneous felonious criminal acts” and assigns 25 points when “three or more contemporaneous felonious criminal acts involving crimes against a person were committed.” MCL 777.42(1)(a). A “felonious criminal act” is deemed contemporaneous if it “occurred within 24 hours of the sentencing offense” and “has not and will not result in a separate conviction.” MCL 777.42(2)(a)(i), (ii).

The presentence investigation report (PSIR) indicated that Rueda entered a guilty plea to one count of armed robbery, and that three additional counts of armed robbery “be nolle prossed at sentencing.” The PSIR described the other offense as follows:

On 12-20-06, Saginaw Police officers were dispatched to the area of Warwick and State for an armed robbery that had just occurred. Central Dispatch indicated there were three males who robbed a subject at gunpoint and then fled on foot As officers arrived on the scene, they searched for the subjects. When warrant information came . . . it indicated that the description of the same suspects had attempted another armed robbery on Court and Michigan

In addition, the felony warrant in the lower court’s file identified four separate counts of armed robbery regarding four different victims, all committed on December 20, 2006. The victims of the armed robbery at the Warwick Cleaners both testified at the preliminary examination regarding the use of a weapon and the items stolen. One victim from the other armed robbery also testified at the preliminary examination regarding the use of a firearm and the items taken from that victim and his companion. The available evidence agrees that the two confrontations

with four different victims occurred within a very short timeframe on the same day, December 20, 2006. These circumstances fulfill the requirements of MCL 777.42(2)(a)(i), (ii) for “contemporaneous criminal felonious acts.”

Finally, Rueda contests the scoring of 25 points for OV 13, asserting that insufficient record evidence supported this score, and that scoring of this variable violated his right against “double punishment for the same criminal conduct” given the trial court’s use of the same three armed robberies in the scoring of OV 12. MCL 777.43(1) addresses a “continuing pattern of criminal behavior.” The trial court premised its scoring of 25 points for OV 13 on its finding that “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(b). The terms of MCL 777.43(2) restrict a court’s scoring of OV 13, in relevant part, as follows:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

(b) The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group’s existence, which may be reasonably inferred from the facts surrounding the sentencing offense.

(c) Except for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12.

In light of the restriction against scoring the same activities under both OV 12 and OV 13, unless “related to membership in an organized criminal group,” MCL 777.43(2)(c), we find that the trial court improperly scored OV 13 at 25 points pursuant to MCL 777.43(1)(b), because the court had already scored the same conduct under OV 12. The trial court properly scored points under MCL 777.43(1)(d), which applies when “[t]he offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group.” The factual circumstances surrounding the armed robberies led the sentencing court to reasonably infer that Rueda acted in concert with his three codefendants as an organized criminal group. Rueda acknowledged his awareness that Howell, Burton and Bracey intended to commit armed robberies. Howell possessed and displayed a firearm to all four victims. Rueda helped to retrieve items from the victims after Howell displayed the firearm. These actions sufficiently demonstrate “a pattern of felonious criminal activity directly related to membership in an organized criminal group.” MCL 777.43(1)(d). However, MCL 777.43(1)(d) only permitted the scoring of 10 points.³

³ We note that an amendment to MCL 777.43, effective April 1, 2009, allows a court to score OV 13 at 25 points if “[t]he offense was part of a pattern of felonious criminal activity directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang” MCL 777.43(1)(b). However, the amendments to OV 13 do not apply to this case, in which the crimes at issue occurred before the statutory amendments. MCL 769.34(2).

A reduction in the scoring of OV 13 from 25 to 10 points alters the minimum statutory guidelines range in MCL 777.62, which applies to class A offenses. The sentencing information report reflects that the trial court placed defendant in prior record variable level C, and totaled 70 OV points, putting defendant in OV level IV, which applies to OV totals between 60 and 79 points. MCL 777.62. The subtraction of 15 points under OV 13 leaves defendant with total OV points of 55, a score that comes within OV level III. MCL 777.62. In conclusion, because “there was a scoring error . . . [and] the scoring error altered the appropriate guidelines range,” this Court must remand to afford defendant “the opportunity to be resentenced on the basis of accurate information.” *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

Affirmed in part, reversed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher